No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, *et al.*,

Petitioners,

—v.—

JACKSON BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS SUBMITTED BY THE AFFIRMATIVE ACTION COORDINATING CENTER, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, THE CENTER FOR CONSTITUTIONAL RIGHTS, AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION, LEAGUE OF MARTIN, SISTERS OF SAINT DOMINIC, WOMEN'S COALITION, INC., AND WOMEN'S DIVISION, GENERAL BOARD OF GLOBAL MINISTRIES, UNITED METHODIST CHURCH

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Brief Amici Curiae of the Affirmative Action Coordinating Center; The National Conference of Black Laywers; The National Lawyers Guild; The Center for Constitutional Rights and other organizations in support of Respondents.

Consent of Parties

Amici Curiae filed this brief with the consent of all parties in support of the position advanced by respondents.

Letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The nine organizations joining in this brief as amici curiae (see Appendix A) represent many sections of American society with diverse interests. They share a mutual concern that the Court use the decision in this case to advance the commitment to rid our nation of the devastation of racial discrimination and race hatred. They are aware of the difficulty of this task.

These groups share an understanding that the continued exclusion of Blacks and other minorities from meaningful poliical and economic participation in the nation's schools is a legacy of slavery and racial discrimination.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Other Authorities

SUMMARY OF ARGUMENT

Amici argue that the provisions of the collective bargaining agreement at issue in this case were designed to help eliminate the vestiges of slavery and segregation in the Jackson School system in a manner which fully effectuates the mandates to the Thirteenth Amendment. Amici further argue that this Court must construe the Equal Protection Guarantees of the Fourteenth Amendment consistent with the Thirteenth Amendment mandate to eliminate the vestiges of slavery. Fundamental rules of constitutional and statutory construction require this Court to follow this approach.

The Petitioners and the United States, by arguing that the Fourteenth Amendment prohibits the kind of voluntary action taken by Jackson Education Association and the Jackson Board of

Education to integrate its faculty have urged upon this Court a construction of the Fourteenth Amendment Equal Protection Clause that would plead out of existence the mandate of the Thirteenth Amendment that requires the steady elimination of the vestiges of slavery. This construction denies the existence of the history of slavery and its legacy and is contrary to law.

ARGUMENT

I. IT IS CONSISTENT WITH THE MANDATES OF THE THIRTEENTH AMENDMENT THAT PARTIES BE ENCOURAGED TO TAKE STEPS TO ELIMINATE ALL VESTIGES OF SLAVERY.

Justice Stewart, writing for the majority in Jones v. Alfred Mayer Company, 392 U.S. 409 (1968) embraced the views of the first Justice Harlan in his dissent in the Civil Rights Cases of 1883, 109 U.S. 3 (1883) as to the rights

created and protected by the Thirteenth Amendment.

In that historic decision, Justice Stewart declared:

> Just as the Black Codes enacted after the Civil War to restrict the free exercise of those rights were substituted for the slave system, so the exclusion of Negroes from White committees becomes a substitute for the Black Codes, and when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin then it too is a relic of slavery." Jones v. Mayer, supra, at 441-443.

Judge Wisdom, who was joined by five other judges in the Fifth Circuit, in a concurring and dissenting Opinion in Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984) recognized that this Court's decision in Jones v. Mayer, supra, restored the Thirteenth Amendment "to its rightful place in the Constitutional scheme."

> The abolition of slavery mandated by the amendment is

not confined to the elimination of the "auction block," that is, the institution of legally enforceable servitude. It also extends to the badges and incidents of a slavery system that were imposed upon blacks as a race. The abolition of slavery was intended to leave in its wake universal civil freedom... The thirteenth Amendment's mandate of universal freedom necessitated protection of blacks as a class against racial discrimination with regard to their civil rights. The burdens on enjoyment of their new found rights thus should be classified as badges of slavery... Because the thirteenth amendment seeks to attain "universal civil freedom for blacks as a race," remedial action must address the needs of blacks as a race. Remedies limited to identifiable victims will not carry out the mandate of the amendment to eliminate the "badges and incidents" of slavery. Nor will a prohibition on present practices alone remove the vestiges of slavery; positive, prospective remedial action is required.

729 F.2d at 1577-1580

II. THE COURT MUST ADOPT AN ANALYSIS OF THE EQUAL PROTECTION GUARANTEES THAT IS CONSISTENT WITH THE THIRTEENTH AMENDMENT MANDATE TO ELIMINATE THE

BADGES, INCIDENTS AND VESTIGES OF SLAVERY.

The task before this Court is to articulate standards of review under the Equal Protection Clause of the 14th Amendment that do not contravene the ability of public and private parties voluntarily to take steps to remedy present conditions of racial discrimination that are linked to slavery.

The statutory analysis of Title VII of the Court in United States v. Weber, 443 U.S. 193 (1979) comes closest to that analysis. The Weber court held that it was permissible for Kaiser Aluminum and the United Steelworkers to voluntarily adopt a race conscious plan to "eliminate traditional patterns of racial segregation." The Court in Weber firmly rooted itself in history and in the underlying purpose of Title VII which

was to tend the plight of the Negro in our economy." The Weber majority rejected arguments similar to the Petitioners and the government's herein to state:

> Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignomious page in this country's history...cannot be interpreted an an absolute prohibition against all private race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long." 110 Cong Rec 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

443 U.S. 193, 204

It is not difficult to analogise the stated goals of Title VII to the mandates of the Thirteenth Amendment to eliminate the badges, incidents and vestiges of slavery as they apply to breaking down under or over-representation of groups in traditionally segregated job categories.

The Court in Weber limited its holding to the private sector, deciding to wait for a later date to address the question whether municipally negotiated affirmative action, i.e. "state action," should cause a different result. The later date has arrived in the present case.

It is beyond question that the Thirteenth Amendment applies to both the public and private sectors. If the

mandates of the Thirteenth Amendment become the constitutional context in which 14th Amendment Equal Protection Guarantees are analyzed, this Court must find racial discrimination like the one at issue here properly justified under the 14th Amendment by the need to eliminate the badges and incidents and vestiges of slavery. Jones v. Alfred A. Mayer Co., 392 U.S. 409 (1968). As Judge John Minor Wisdom pointed out in his pathbreaking opinion in Williams v. City of New Orleans, 729 F.2d 1554, 1579 (5th Cir. 1984), "current forms of racial discrimination are badges of slavery that may be proscribed under the thirteenth amendment if they are historically linked with slavery or involuntary servitude."

III. THE GROSS UNDER-REPRESENTATION AND SEGREGATION OF MINORITY FACULTY IS A VESTIGE OF SCHOOL SEGREGATION WHICH IS A CLEAR VESTIGE OF SLAVERY.

Prior to the Civil War most of the few schools available to Black Americans in the North were intentionally segregated under the "Jim Crow" (racist) laws first put into place in Northern states.[1] After the Civil War, liberal northerners involved in the Freedman's Bureau set up the first schools for black children in the south. Black pressure for educational opportunities contributed to the growth of schools over the last decades of the 19th century and the first decades of the 1900s.[2] As black schools became more widespread in the south, and

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[1]Lerone Bennett, Jr., Before the Mayflower (Baltimore: Pelican Books, 1966), pp. 220-225.

[2]Henry A. Bullock, A History of Negro Education in the South (New York: Praeger, 1967), 23-59, 151 ff.

as former slaveholding whites took back the reigns of power from those who held power during Reconstruction, black schools were rigidly and comprehensively segregated under southern law. That the intent of former white slaveholders was to perpetuate the same type of control and subordination of blacks as had been the case under slavery is well-documented in historical research.[3] A few black colleges were allowed, under strict white supervision, to prepare the thousands of black teachers required for the segregated schools of the 1890-1960 period of semi-slavery in the south.[4] The colleges never had the resources to

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[3]Ibid. pp. 152-193; Gunnar Mydal, An American Dilemma, vol. 2 (New York: McGraw Hill Paperback, 1962), pp. 893-952.

[4]Bullock, A History of Negro Education, pp. 31-32; Myrdal, An American Dilemma, vol. 2, pp. 632, 893-897.

provide the number of teachers necessary because of extreme discrimination in the distribution of tax monies.

It wasn't until the 1967-1971 period that significant school desegregation came to the south. Technically, the demise of legal segregation in schools began in the 1950s, but 1970 is perhaps a more accurate date to mark the end of legal (formal) segregation in the south. In addition, when desegregation was forced upon formerly segregated school districts, thousands of black teachers were dismissed, in part because the whites in control indulged in racial nepotism and did not want white children to be taught by black teachers. Between 1967 and 1971 alone more than 6,000 black teachers were displaced. Half were dismissed, while the rest were demoted, assigned out of their fields, or put in

unsatisfactory placements.[5] Butler's study of Louisiana teachers demonstrates that the black percentage of all teachers in Louisiana decreased over the 1966-1971 period of school desegregation. Many black teachers, usually without any careful evaluation, were dismissed for "incompetancy," which was the rationalization racist white administrators utilized.[6]

Widespread dismissals in the south had the effect of discouraging younger Black Americans from training to be teachers. In addition, there were far fewer role models in the form of black teachers -- once a major role model across the south -- for black young

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[5]John S. Butler, "Black Educators in Louisiana -- A Questicn of Survival," Journal of Negro Education (Winter 1974), pp. 9-24.

[6]Id.

people in cities and rural areas.[7] Since the Jackson School Board recruited black teachers from the south, and since they found there a smaller pool of teachers than would have been the case without slavery, and segregation, the vestiges of slavery can be seen in the under-representation of black teachers in Jackson.

According to the Carnegie Foundation report, The Condition of Teaching, black teachers are sharply under-represented nationally and in Michigan. In the fall of 1980, about 27 percent of U.S. children in school (K-12) were minority, while only 12.5 percent of the teachers were minority. In Michigan, 21.3 percent of the students were minority, compared

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[7]Id.

to just 11.6 percent of the teachers.[8] Most of the minority students and teachers are black. This significant under-representation in Michigan is not new and is rooted in the slavery and semi-slavery systems which handicapped, and continue to handicap, Black Americans. Resource deficits of black parents translate into fewer young black teachers in eligibility pools.

IV. IT WAS REASONABLE FOR THE PARTIES TO CONCLUDE THAT THE GOAL OF REACHING PARITY BETWEEN THE PERCENTAGE OF MINORITY TEACHERS AND MINORITY STUDENTS WOULD GO A LONG WAY TOWARD ELIMINATING EFFECTS OF RACIAL SEGREGATION IN THE SCHOOL SYSTEM; THUS, THE NEGOTIATED SENIORITY SYSTEM WHICH RETAINS MINORITY PERCENTAGES BEFORE AND AFTER LAY OFF IS TOTALLY BONA FIDE.

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[8] C. Emily Feistritzer, The Condition of Teaching: A State by State Analysis (Princeton, N.J.: Carnegie Foundation for the Advancement of Teaching, 1983), pp. 27, 43.

Respondents have stated the facts and history behind the negotiation of the contract in question in respondent's brief. Amici do not repeat that here except to state our agreement that it was perfectly reasonable for the parties to conclude that achieving parity between the percentage of minority teachers and minority students would go a long way toward eliminating the effects of racial segregation. The lay off provision contained in Article XII which helps achieve that end is therefore totally bona fide. Because the previous condition of school and faculty segregation under-representation of minority faculty in the Jackson schools is easily linked to slavery the voluntary act of the school board and the union to dismantle that segregated system is totally consistent with the mandates of the Thirteenth Amendment.

If, as Amici argue, the actions of the Jackson School Board are totally consistent with the mandates of the Thirteenth Amendment, fundamental principles of constitutional construction require that this court adopt a Fourteenth Amendment Equal Protection analysis that will give effect to both provisions. It is for this reason that Amici assert that an action which is consistent with the mandates of the Thirteenth Amendment cannot violate the Equal Protection Clause of the Fourteenth Amendment.

Because of the history of slavery, black Americans have consistently faced high levels of racial discrimination in housing, jobs and education from the the 1880s to the present. In that slavery was fundamentally based on an ideology of white supremacy, non-white minorities

such as Hispanics suffer from some of the same disabilities as Blacks.

Any race-conscious remedy which is designed to end an over-representation of whites in a traditionally segregated job category will fall on whites who did not directly participate in the conditions sought to be remedied. This is unfortunate, but also a reality. Care, however, may be taken to ensure that the interests of whites not be unnecessarily trammeled.

This Court has consistently upheld the use of race conscious remedies (Bakke, Weber, Fullilove).

Amici urge this Court to give broad discretion to parties to collective bargaining agreements and courts dealing with consent decrees to fashion race conscious remedies which effectuate the purposes of the thirteenth and fourteenth amendments. The Jackson Board of

Education acted reasonably in negotiating its collective bargaining agreement. The agreement is totally consistent with the policy of non-discrimination which has found support in hundreds of this Court's opinions. The contract language should therefore be upheld.

V. CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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INDEX TO APPENDIX

APPENDIX A

AMICI STATEMENTS OF INTEREST

The AFFIRMATIVE ACTION COORDINATING CENTER (AACC) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR), and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other other organizations. Many network organizations, as well as other groups, have joined as amici in this brief.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civl rights, labor, and

women's rights attorneys to discuss the WEBER, BAKKE, FULLILOVE, AND WHITE cases.

The AACC publishes an informational newsletter entitled AACC News. It is preparing several plain language publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION is a national, professional association for equal opportunity-affirmative action administrators and specialists, individuals, and organizations sharing similiar interests and concerns. It was founded in 1974 to foster the implementation of affirmative action and equal opportunity nationwide and to provide liason with other organizations committed to the same purposes or objectives. The Association urges affirmance of the decision of the Sixth Circuit Court of Appeals in this case.

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) was born of the civil rights movement and the struggles of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing, and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans, and Chicanos.

The LEAGUE OF MARTIN is a non-profit organization incorporated in 1974. Members of the League of Martin have been Milwaukee police officers and the organization's primary concern is racial discrimination within the Milwaukee Police Department. The League of Martin has undertaken numerous activities to eliminate discriminatory employment practices of the City of Milwaukee Police Department including filing of charges of discrimination with the United States Equal Employment Opportunity Commission and litigation.

The NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) is an activist legal organization of Black lawyers, law professors, judges, and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has led the struggle for the full implementation of the principles of affirmative action that have been affirmed by the Congress and the courts.

The NATIONAL LAWYERS GUILD (NLG) was founded in 1937 as a multi-racial and progressive alternative to the American Bar Association. Its commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated its full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild has filed briefs in every major affirmative action case to reach this Court.

The SISTERS OF SAINT DOMINIC, based in Racine, Wisconsin, is a national congregation of Catholic women religious of approximately 360. In 1977, the Sisters of St. Domic stated that they would identify with the poor, oppressed, and alienated and would work in an advocacy role, helping them to secure what is rightfully theirs. The community holds that integration of the public work force is a value to be achieved and supercedes strict seniority in hiring and layoff procedures.

The WOMEN'S COALITION, INC. is an umbrella organization of thirteen women's organizations in Milwaukee, Wisconsin. The Coalition was established in 1972 to meet the needs of Milwaukee area women through organizing, establishing services, providing a meeting place for women, and creating a centralized information and referral service. Among its activities has been sponsoring annual "Take Back the Night" demonstrations and activities related to the problem of sexual assault and violence against women, and thousands of person have participated in these actions locally.

The WOMEN'S DIVISION, GENERAL BOARD OF GLOBAL MINISTRIES, UNITED METHODIST CHURCH, is the policy making body for over 1,000,000 United Methodist Women throughout the United States. The division has a long history of actions and concerns about economic justice and collective bargaining. For over 100 years it has undertaken mission work on behalf of the poor and oppressed. The division urges affirmance of the decision of the sixth circuit court of appeals in this case.